U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted] Public Copy

FILE: [redacted] Office: Buffalo Date: AUG 23 2000
EAC 95 265 50336

IN RE: Petitioner: [redacted]
Beneficiary:

APPLICATION: Petition for Special Immigrant Battered Spouse Pursuant to Section 204(a)(1)(B)(ii) of the Immigration and Nationality Act, 8 U.S.C. 1154(a)(1)(B)(ii)

IN BEHALF OF PETITIONER: Self-represented

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the District Director, Buffalo, New York. An appeal was dismissed by the Associate Commissioner for Examinations, and a subsequent motion to reopen was also dismissed by the Associate Commissioner. The matter is again before the Associate Commissioner on another motion to reopen. The motion will be dismissed.

The petitioner is a native and citizen of [redacted] who is seeking classification as a special immigrant pursuant to section 204(a)(1)(B)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1154(a)(1)(B)(ii), as the battered spouse of a lawful permanent resident of the United States.

The district director denied the petition after determining that the petitioner had failed to establish that her removal from the United States would result in extreme hardship to herself or to her child.

Upon review of the record of proceeding, the Associate Commissioner concurred with the director's conclusion and denied the petition on June 17, 1999.

In a motion to reopen the Associate Commissioner's decision, the petitioner states that she gave up everything she owned in her country before joining her former husband in the United States; therefore, she has no home and no close family members to help her resettle in [redacted] The Associate Commissioner reviewed the evidence furnished by the petitioner on motion and determined that the petitioner failed to overcome the findings of the director and the Associate Commissioner. He dismissed the motion on March 7, 2000.

Another motion to reopen, filed on April 6, 2000, is again before the Associate Commissioner. This motion was filed by an individual claiming to the petitioner's new counsel. In order to be recognized in these proceedings as the petitioner's authorized representative, however, counsel must submit a properly executed Notice of Entry of Appearance as Attorney or Representative (Form G-28). Since none has been provided, the applicant will be considered to be self-represented.

The petitioner submits a self-affidavit; articles regarding [redacted] present economy; a list of the petitioner's medications and costs; police clearance of the petitioner and her son; copies of letters from relatives in the United States previously furnished; letters from Jehovah's Witnesses; and her son's acceptance letter from [redacted] Community College. The petitioner states that additional evidence is being compiled and

such evidence shall be forwarded to the Service within the next 60 days. However, as of the date of this notice, no additional evidence is entered into the record of proceeding.

Pursuant to 8 C.F.R. 103.5(a)(2), a motion to reopen must state the new facts to be proved at the reopened proceedings and be supported by affidavits or other documentary evidence. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. 103.5(a)(4).

Based on the plain meaning of "new," a new fact is held to be evidence that was not available and could not have been discovered or presented in the previous proceeding.[1]

When used in the context of a motion to reopen in analogous legal disciplines, the terminology "new facts" or "new evidence" has been determined to be evidence that was previously unavailable during the prior proceedings. In removal hearings and other proceedings before the Board of Immigration Appeals, "[a] motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing...." 8 C.F.R. 3.2 (1999). In examining the authority of the Attorney General to deny a motion to reopen in deportation proceedings, the Supreme Court has found that the appropriate analogy in criminal procedure would be a motion for a new trial on the basis of newly discovered evidence. INS v. Doherty, 502 U.S. 314, 323 (1992); INS v. Abudu, 485 U.S. 94, 100 (1988). In federal criminal proceedings, a motion for a new trial based on newly discovered evidence "may not be granted unless....the facts discovered are of such nature that they will probably change the result if a new trial is granted,....they have been discovered since the trial and could not by the exercise of due diligence have been discovered earlier, and....they are not merely cumulative or impeaching." Matter of Coelho, 20 I&N Dec. 464, 472 n.4 (BIA 1992)(quoting Taylor v. Illinois, 484 U.S. 400, 414 n.18 (1988)).

On motion, the petitioner argues that her removal from the United States would result in extreme hardship because: she is suffering from complicated migraine, asthma, and sinusitis and if returned to [redacted] she would receive no health care, and even if she were to

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[1] The word "new" is defined as "1. having existed or been made for only a short time.... 3. Just discovered, found, or learned <*new* evidence> ...." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

find employment, most if not all of her salary would go to the costs of her medications; she would be unable to find employment because of the decline of [redacted] economy; her son would not be able to attend college in [redacted] and that he has been accepted by the [redacted] Community College; and she and her son have established deep roots in the United States.

A review of the evidence submitted on motion reveals no fact that could be considered "new" under 8 C.F.R. 103.5(a)(2). The evidence submitted was previously available and could have been discovered or presented in the previous proceeding. It is also noted that the petitioner's arguments were addressed by the Associate Commissioner in his previous decision. For these reasons, the motion may not be granted.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. INS v. Doherty, supra, at 323 (citing INS v. Abudu, 485 U.S. at 107-108). A party seeking to reopen a proceeding bears a "heavy burden." INS v. Abudu, supra, at 110.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The motion is dismissed.